IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN H. ROSKY,
Appellant,
vs.
THE STATE OF NEVADA; AND ATTORNEY GENERAL, AARON D. FORD,
Respondents.

No. 82578-COA

FILED

DEC 13 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

John H. Rosky appeals from a district court order denying a petition for declaratory relief. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Rosky, an inmate, brought the underlying petition for declaratory relief against respondents the State of Nevada and Nevada Attorney General Aaron D. Ford. In his petition, Rosky requested a declaration with respect to whether a criminal defendant's right to due process requires that the district court instruct the jury in accordance with NRS 47.230 and NRS 175.161 when a presumed fact that is an element of the offense for which the defendant is accused is submitted to the jury. From there, Rosky alleged that the general verdict form used at his criminal trial included a presumed fact and did not comply with statutory law, and he attached an excerpt from the form to his petition. The district court determined that Rosky was seeking relief from his judgment of conviction

or sentence and denied his petition on grounds that a postconviction petition for a writ of habeas corpus was the exclusive remedy for an incarcerated person to challenge a conviction or sentence. This appeal followed.

On appeal, Rosky initially maintains that the dismissal of his petition violated NRS 30.080, which provides the district court with discretion to decline requests for declaratory relief "where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Rosky's argument is based on *El Capitan Club v. Fireman's Fund Ins. Co.*, which explains that the district court may only exercise its discretion to decline a request for declaratory relief based on the availability of alternative remedies if it "appear[s] that the asserted alternative remedies are available to the plaintiff seeking the declaratory relief, and that such remedies are speedy and adequate or as well suited to the plaintiff's needs as is declaratory relief." 89 Nev. 65, 70, 506 P.2d 426, 429 (1973). These authorities do not establish a basis for relief, however, because the district court did not dismiss Rosky's petition based on its discretion to decline to grant a request for declaratory relief, but instead, relied on its determination that a writ of habeas corpus was the exclusive remedy available to Rosky because he was challenging his judgment of conviction or sentence.

Rosky challenges that determination by essentially arguing that the district court misconstrued his petition.[1] In particular, Rosky

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[1]To the extent that Rosky also argues that *El Capitan* indicates that a petition for a writ of habeas corpus was not the only avenue available to

maintains that his allegation concerning the general verdict form in his criminal case being improper was irrelevant to the relief he sought, which was a declaration addressing whether a criminal defendant's right to due process requires that, when a presumed fact that is an element of the offense for which the defendant is accused is submitted to the jury, the jury be instructed in accordance with NRS 47.230 and NRS 175.161. But to bring a claim for declaratory relief, a plaintiff must have standing. *See Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 10, 908 P.2d 724, 725 (1996) (requiring a plaintiff to establish standing to assert a claim for declaratory relief by establishing the existence of, among other things, a justiciable controversy, a legally protectable interest, and an issue ripe for determination). And Rosky's bare request for a declaration concerning a criminal defendant's due process rights does not establish his standing to bring such a claim, as it does not show that he suffered a personal injury. *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) (providing that, to establish standing, a plaintiff "must show a personal

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him to challenge his judgment of conviction or sentence, his argument is unavailing. Indeed, *El Capitan* only concerned the circumstances in which the district court may exercise its discretion to deny a petition for declaratory relief, and, therefore, did not address the circumstances in which a claim must be presented by way of a petition for a writ of habeas corpus. *Id.* at 68-70, 506 P.2d at 428-29. That issue is addressed in more recent supreme court decisions, including *Harris v. State*, which explains that "[a] post-conviction petition for a writ of habeas corpus is the *exclusive remedy* for challenging the validity of a conviction or sentence aside from" certain instances not relevant here. 130 Nev. 435, 437, 329 P.3d 619, 621 (2014) (citing NRS 34.724(2)(a)).

injury and not merely a general interest that is common to all members of the public"); *see also Lamb v. Doe*, 92 Nev. 550, 551, 554 P.2d 732, 733 (1976) (directing the district court to dismiss an action seeking an abstract interpretation of a criminal statute, and stating that "[i]t is not the court's business to render advisory opinions for unknown persons who may or may not have a justiciable controversy with named defendants").

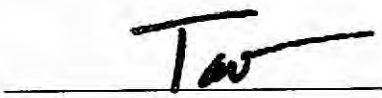
For purposes of standing, the lynchpin of Rosky's petition was his allegation concerning the illegality of his general verdict form, which showed the personal injury necessary for standing insofar as it suggested that he believed that he did not receive the protections of NRS 47.230 and NRS 175.161 at his criminal trial in violation of his due process rights. *See Doe v. Bryan*, 102 Nev. 523, 525-26, 728 P.2d 443, 444-45 (1986) (involving plaintiffs who sought to have a statute declared unconstitutional, and requiring the plaintiffs to establish their standing by showing that they were arrested or threatened with prosecution under the statute). But to the extent that Rosky was seeking a declaration to that effect, his claim was not cognizable because success on the claim would necessarily imply the invalidity of his judgment of conviction or sentence, and he did not allege that either had been overturned or invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (holding that while a plaintiff may seek damages for an allegedly unconstitutional conviction or imprisonment pursuant to 42 U.S.C. § 1983, dismissal is required unless the plaintiff demonstrates that the conviction or sentence has been overturned or called into question by the issuance of a writ of habeas corpus); *see also Edwards v. Balisok*, 520

U.S. 641, 648 (1997) (applying *Heck* to a claim that sought declaratory relief in addition to damages).

Thus, given the foregoing, Rosky failed to demonstrate that relief from the order dismissing his petition is warranted. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kathleen M. Drakulich, District Judge
John H. Rosky
Attorney General/Carson City
Washoe District Court Clerk

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[2]Insofar as Rosky raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.